ATTORNEY FOR APPELLANT:

ELLEN M. O'CONNOR
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

ROBIN HODAPP-GILLMAN
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

KENNETH BARTLETT,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A05-0107-CR-306
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable W.T. Robinette, Judge
Cause No. 49G03-0009-CF-165661

May 8, 2002

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Kenneth Bartlett was convicted following a bench trial of unlawful possession of a firearm by a serious violent felon, a Class B felony, and was sentenced to ten years, six years to be executed and four years suspended, with two years on probation.[1] He now appeals. We affirm.

Issues

Bartlett raises two issues for our review, which we restate as follows:

1. Whether the trial court properly denied his motion to suppress the handgun found during a traffic stop; and

2. Whether there was sufficient evidence to support his conviction.

Facts and Procedural History[2]

On September 9, 2000, Bartlett was operating a motor vehicle in Marion County, Indiana. Indianapolis Police Department officer Michael Horn observed that the vehicle did not have an illuminated license plate and initiated a traffic stop. From his patrol car, Officer Horn observed Bartlett reach toward the center console of his car. Officer Horn approached the car and asked Bartlett for his driver's license. Bartlett replied that he did not have a license. Officer Horn then asked if there was anything in the car of which he should be aware. Bartlett indicated that he had a gun in the console. Officer Horn instructed Bartlett to exit the vehicle and handcuffed him. He then asked Bartlett if he had a license to carry the

[1] Bartlett was also convicted of carrying a handgun without a license, a Class A misdemeanor, and sentenced to four years, concurrent with his sentence for unlawful possession. However, following a motion to correct errors filed by Bartlett alleging a double jeopardy violation, this sentence was vacated. Appellant's Appendix at 75.

[2] Oral argument was heard in this case on April 10, 2002 at Ivy Tech College in Lafayette, Indiana. We express our appreciation to counsel for both sides for making the trip to Lafayette, and to the faculty, staff, and students of Ivy Tech for their hospitality.

gun and Bartlett replied that he did not. Officer Horn then placed Bartlett under arrest and retrieved a loaded .25 caliber handgun from the vehicle's center console.

Bartlett was charged with driving while suspended with a prior conviction within ten years, a Class A misdemeanor, carrying a handgun without a license, a Class A misdemeanor, and, because of a prior felony conviction for dealing cocaine, unlawful possession of a firearm by a serious violent felon, a Class B felony. In addition, Bartlett was charged with carrying a handgun without a license charge enhanced to a Class C felony because of a prior felony conviction within fifteen years. Bartlett filed a motion to suppress evidence of the handgun as the product of an illegal search, and waived a trial by jury. On March 2, 2001, the trial court held a combined motion to suppress hearing and bench trial. When the State moved to admit into evidence the handgun found in Bartlett's vehicle, the following exchange took place:

> [State]: Judge, at this point I would move to admit [the handgun].
> [Defense]: Your Honor, since we're sort of doing two things at once, for purposes of the motion to suppress, I would have no objection to the State admitting [the handgun]. For purposes of the actual trial, I would ask that you keep it under advisement for trial purposes until you render a decision on the motion to suppress.
> [Court]: I'll do that. For the purpose of the motion to suppress, it's entered. For the purpose of the trial, it's under advisement.
> [State]: Pending a ruling on the motion to suppress; understood.
> [Court]: Right.

Transcript at 12-13. On May 25, 2001, the trial court issued its ruling as follows:

> [Court]: We're here on the Kenneth Bartlett matter. This matter came before the Court for suppression and trial at the same time . . . .
> * * *
> Well, let the record show that the Lockett v. State just came down from the Supreme Court, in my opinion, right on issues on this, and if it didn't change

> the law, it clarified the law. And based on Lockett v. State and the facts in this case, I'm going to find [Bartlett] guilty of Count One, Unlawful Possession of a Firearm by a Serious Violent Felon, a Class B felony; Count Two, Carrying a Handgun without a License as a Class A misdemeanor. I'm finding him not guilty of Count Three[, driving while suspended].
> * * *
> [State]: Your Honor, just so the record is clear, are you also denying [Bartlett's] Motion to Suppress?
> [Court]: Yes. I'm sorry. For the record, I am denying the Motion to Suppress.

Transcript at 31-32. Bartlett now appeals the denial of his motion to suppress and his conviction.

Discussion and Decision

I. Motion to Suppress

Prior to trial, Bartlett filed a motion to suppress evidence seized as a result of the search of his car, specifically, the handgun found in the center console. Bartlett contends that the trial court's denial of this motion was in error.

A. Standard of Review

We initially note our standard of review when reviewing a trial court's ruling on the validity of a search and seizure: we consider the evidence most favorable to the ruling and any uncontradicted evidence to the contrary to determine whether there is sufficient evidence to support the ruling. Melton v. State, 705 N.E.2d 564, 566 (Ind. Ct. App. 1999). If the evidence is conflicting, we consider only the evidence favorable to the ruling and will affirm if the ruling is supported by substantial evidence of probative value. Id. Moreover, we may affirm the trial court's ruling on a motion to suppress if it is sustainable on any legal grounds apparent in the record. Robinson v. State, 730 N.E.2d 185, 192 (Ind. Ct. App. 2000), trans.

denied.

B. The Stop

Officer Horn, the sole witness at Bartlett's motion to suppress hearing/bench trial, testified that the stop began as follows:

> I observed a vehicle that was eastbound on 38th Street. The vehicle was operating with no operable license plate light to illuminate at night. I stopped the vehicle on East 38th Street for the infraction. When my emergency equipment, including my floodlamps from the rotating lights, illuminated the inside compartment of the vehicle I observed the driver reaching to the center of the console of the vehicle. It looked like he was either placing or retrieving something from inside. After that motion was completed I walked up to the driver's side of the vehicle and I had my contact with him.

Transcript at 8. Officer Horn approached the vehicle and asked the driver, later determined to be Bartlett, if he had a driver's license. Bartlett replied that he did not. Officer Horn then asked him, "[I]s there anything in the vehicle that I need to be aware of? And he said, yes." Id. at 9. Officer Horn justified asking the question based upon his previous observation of Bartlett reaching toward the center of the car:

> Due to the fact that the individual reached in the – towards the center of the console of the vehicle, I would assume that he was – if he was placing or retrieving something from the center console, I would think that it would probably be his registration. When I got up to the vehicle and noticed that he had nothing in his hand, for officer's safety I asked if there was anything in the vehicle that I needed to be aware of.

Id. at 9-10. Officer Horn then got Bartlett out of the vehicle, handcuffed him and asked him if he had a license to carry the handgun. When Bartlett replied that he did not, Officer Horn placed him under arrest.

Bartlett conceded both in his appellate brief and at oral argument that the traffic stop

for the equipment violation was initially valid. However, he contends that the traffic stop evolved into an unreasonable search and arrest when Officer Horn asked if there was "anything" in the car he needed to know about. The trial court found that our supreme court's recent pronouncement in Lockett v. State, 747 N.E.2d 539 (Ind. 2001), was determinative and denied Bartlett's motion to suppress on that basis. Lockett was decided solely on Fourth Amendment grounds, however, and Bartlett has made an Article I, section 11 argument under the Indiana Constitution that asking such a question is unreasonable under these circumstances. Because we may affirm a trial court's ruling on a motion to suppress on any grounds, and because we have a duty not to enter into the consideration of a constitutional question where we can perceive another ground upon which we may properly rest our decision, Carroll v. State, 740 N.E.2d 1225, 1231 (Ind. Ct. App. 2000), trans. denied, we hold that due to the circumstances of this stop, the gun would have been discovered even in the absence of Officer Horn's question, and therefore the motion to suppress was properly denied.

C. Inevitable Discovery

Generally, a search warrant is a prerequisite to a constitutionally proper search and seizure. State v. Farber, 677 N.E.2d 1111, 1116 (Ind. Ct. App. 1997), trans. denied. As an exception to the exclusionary rule, the "inevitable discovery" doctrine permits the introduction of evidence, found during an unlawful search, that eventually would have been uncovered by lawful means. Cody v. State, 702 N.E.2d 364, 366 (Ind. Ct. App. 1998). See Nix v. Williams, 467 U.S. 431, 444 (1984). The rationale is that when the authorities have

seized evidence in violation of statutory or constitutional protections, they should be placed in no better, but no worse, position than they would have been had no impropriety occurred. Bartruff v. State, 706 N.E.2d 225, 229 (Ind. Ct. App. 1999).

1. Initial Traffic Stop

Indiana Code section 34-28-5-3 states that an officer may detain a person who he in good faith believes has committed an infraction or ordinance violation for a time sufficient to inform him of the allegation, obtain his name, address, and date of birth or his driver's license, and allow him to execute a notice to appear. Driving a vehicle with a non-working rear registration plate lamp is a Class C infraction. Ind. Code § 9-19-6-4(e) ("Either a tail lamp or a separate lamp must be placed and constructed so as to illuminate the rear registration plate with a white light and make the plate clearly legible from a distance of fifty (50) feet to the rear."); § 9-19-6-24. Thus, Officer Horn was clearly entitled to detain Bartlett for a time sufficient to complete the purpose of the traffic stop: issuing a warning or citation for the equipment violation.[3] See Callahan v. State, 719 N.E.2d 430, 437 (Ind. Ct. App. 1999) (officer was entitled to detain defendant upon observing his vehicle with improperly tinted windows).

2. Lack of Driver's License

[3] We have noted that Bartlett concedes the initial validity of the stop. He does, however, allege that the stop was pretextual. It has repeatedly been held by courts of this state that a lawful traffic stop is not converted into an unreasonable search and seizure under the Fourth Amendment even if pretextual. See Kenner v. State, 703 N.E.2d 1122, 1126 n.1 (Ind. Ct. App. 1999), trans. denied; State v. Voit, 679 N.E.2d 1360, 1363 (Ind. Ct. App. 1997). Recently, our supreme court declared in a case of first impression that the Indiana Constitution does not prohibit pretextual stops so long as the stop is warranted by circumstances unrelated to the officer's subjective motive. Mitchell v. State, 745 N.E.2d 775, 787 (Ind. 2001). Therefore, even if Bartlett were able to prove that the stop was a mere pretext to search for criminal activity, he would not prevail on this argument.

The most common way of obtaining identifying information from the driver of a vehicle is by asking for his or her driver's license. Officer Horn did just that in this case and Bartlett informed him that he did not have a license. Had Officer Horn conducted further inquiry into the status of Bartlett's license, he would have learned that Bartlett's driver's license was suspended. However, even without conducting that inquiry, Bartlett was violating Indiana Code section 9-24-18-1, which provides that it is a Class C misdemeanor to operate a motor vehicle upon a highway without a valid driver's license. Under this section, the burden is on the defendant to prove that he had been issued a driver's license and that it was valid at the time of the alleged offense. Ind. Code § 9-24-18-1(b). An officer may arrest a person without a warrant if the officer has "probable cause to believe the person is committing or attempting to commit a misdemeanor in the officer's presence . . . ." Ind. Code § 35-33-1-1(a)(4). Therefore, even if Bartlett did have a valid driver's license, Officer Horn still would have been justified in arresting him for failure to have a license and Bartlett would have been required to defend the charge with proof of a valid license.

3. Impoundment of Vehicle

Because Officer Horn could have arrested Bartlett for committing at least a misdemeanor in his presence, and because Bartlett was the sole occupant of the vehicle, the vehicle itself could have been impounded and an inventory search conducted.

An impoundment is warranted when it is part of "routine administrative caretaking functions" of the police or when it is authorized by state statute. Woodford v. State, 752 N.E.2d 1278, 1281 (Ind. 2001) (citing South Dakota v. Opperman, 428 U.S. 364, 370 n.5

(1976) and Goliday v. State, 708 N.E.2d 4, 7 (Ind. 1999), petition for cert. filed (U.S. Jan. 17, 2002) (No. 01-8239). Here, Bartlett was stopped on East 38th Street in Indianapolis, a heavily-traveled thoroughfare. Because Officer Horn could have placed Bartlett under arrest for failure to have a driver's license and because no one else was present to take control of the vehicle, the car would have created a public motor hazard had it been left where it was when Bartlett was stopped. Officer Horn could have reasonably and lawfully decided to impound the vehicle.

Upon impoundment, Officer Horn could have conducted a limited inventory search of a vehicle in order to insure safety. Whether or not this limited inventory search would have uncovered the handgun in the console, a more thorough inventory search conducted pursuant to department guidelines or a judicially obtained search warrant would have been conducted once the vehicle reached the impound lot, and the handgun would have been discovered then. An inventory search is a recognized exception to the warrant requirement. Lewis v. State, 755 N.E.2d 1116, 1125 (Ind. Ct. App. 2001). See also South Dakota v. Opperman, 428 U.S. 364, 372 (1976).

Therefore, even if we are to assume for the sake of argument that Bartlett is correct in asserting that Officer Horn could not have asked if there was anything in the vehicle he should know about, the facts and circumstances of this stop lead to the conclusion that the handgun would have been discovered anyway. We do not have to rely exclusively upon Bartlett's response to the question in order to reach the handgun as evidence. The trial court did not err in denying Bartlett's motion to suppress.

II. Sufficiency of the Evidence

Bartlett also contends that the evidence is not sufficient to support his conviction because the gun was never introduced into evidence at trial.

A. Standard of Review

When reviewing a challenge to the sufficiency of the evidence, reviewing courts neither reweigh the evidence nor judge the credibility of the witnesses. Randolph v. State, 755 N.E.2d 572, 576 (Ind. 2001). We consider only the evidence most favorable to the judgment, as well as all reasonable inferences to be drawn therefrom. Sanders v. State, 704 N.E.2d 119, 123 (Ind. 1999). If the evidence and inferences provide substantial evidence of probative value to support the verdict, we must affirm. Id.

B. Was the Gun in Evidence?

As noted in the *Facts and Procedural History* section above, Bartlett's motion to suppress the handgun was heard simultaneously with his bench trial on the charges. When the State moved to admit the handgun found in Bartlett's car into evidence, Bartlett objected for purposes of preserving his motion to suppress in the bench trial segment of the proceedings. Due to the unusual dual nature of the proceedings, the trial court was required to admit the handgun for the motion to suppress hearing in order to consider its ultimate admissibility, and to take the admission of the handgun for the bench trial under advisement until such time as it ruled upon the motion to suppress. With all parties in court, the trial court issued its ruling: the motion to suppress was denied, and Bartlett was found guilty of unlawful possession of a firearm by a serious violent offender. Presumably, all parties

understood that if the motion to suppress were denied, such that the trial court had determined that the stop and search was proper, then the handgun would be admitted for trial purposes and considered in the ultimate determination of guilt.

Indiana Code section 35-47-4-5 reads in part as follows:

> (a) As used in this section, "serious violent felon" means a person who has been convicted of:
>
> (1) committing a serious violent felony in:
>
> (A) Indiana . . . .
>
> * * *
>
> (b) As used in this section, "serious violent felony" means:
>
> * * *
>
> (23) dealing in or manufacturing cocaine, a narcotic drug, or methamphetamine (IC 35-48-4-1);
>
> * * *
>
> (c) A serious violent felon who knowingly or intentionally possesses a firearm commits unlawful possession of a firearm by a serious violent felon, a Class B felony.

There was evidence before the court for trial purposes that Bartlett had a gun in his vehicle, that he had no license to carry the gun, and that he had a prior conviction in Marion County, Indiana, for dealing in cocaine as a Class B felony. State's Exhibit 1. Therefore, the evidence was sufficient to support Bartlett's conviction.

Conclusion

The trial court did not err in denying Bartlett's motion to suppress. The handgun would have been "inevitably discovered" under the facts and circumstances of this case. Because the motion to suppress hearing and the bench trial were held simultaneously, the fact that the trial court took the admission of the handgun into evidence under advisement until such time as it ruled on the motion to suppress does not necessarily mean that the handgun

was never admitted into evidence. The trial court properly denied the motion to suppress, considered the handgun, and there was sufficient evidence to support a conviction of unlawful possession of a handgun by a serious violent felon. Bartlett's conviction is affirmed.

Affirmed.

SULLIVAN, J., concurs.

KIRSCH, J., concurs in result.